IN THE

SUPREME COURT OF THE UNITED STATES

Case No.

83-5909

ROY ALLEN HARICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT OF
FLORIDA

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QUESTIONS PRESENTED

I.

Whether Petitioner was denied due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution as a result of the perfunctory and conclusive nature of the trial court's written findings of fact in support of the death penalty thus precluding meaningful review?

II.

Whether the Florida Supreme Court's affirmance of Petitioner's conviction and death sentence, left unredressed the trial court's denial of Petitioner's right to due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, when the trial court ruled that certain previously-suppressed statements of Petitioner could be introduced during the penalty phase through the testimony of Sergeants Vail and Burnsed?

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TABLE OF AUTHORITIES

OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this Petition is reported as Harich v. State, 437 So.2d 1082 (Fla. 1983). It is reproduced in the appendix as item one. (A 1-6)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion in this case on August 25, 1983. (A 1-6) Petitioner filed a Motion for Rehearing (A 7-9) which was denied on October 12, 1983. (A 10) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall injoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

3. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the Unites States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

5. Section 921.141, Florida Statutes (1981) which is set forth in the Appendix as item four. (A 11-12)

STATEMENT OF THE CASE

Petitioner was convicted following a jury trial in Volusia County, Florida of one count of first degree murder, one count of attempted first degree murder, one count of the use of a firearm in the commission of a felony, and two counts of kidnapping. (A 14-17) Prior to trial, Petitioner filed a Motion to Suppress the statement that he made to investigators Vail and Burnsed. (A 13) The trial court granted the Motion in part and denied it in part. (A 18-22) The previously suppressed statements were eventually introduced at the penalty phase over Petitioner's objection. (A 4-5, 23-30) At the close of the evidence presented during the penalty phase, the jury returned with a nine to three recommendation that the court impose the death penalty. (A 4)

The trial court adjudicated the appellant guilty on all five counts and sentenced Petitioner to death for the first degree murder. (A 2, 17) The trial court entered written findings of fact in support of the imposition of death. (A 31-33) An appeal was taken and the Florida Supreme Court affirmed Petitioner's convictions and sentences in an opinion

rendered on August 25, 1983. [Harich v. State, 437 So.2d 1082 (Fla. 1983) (A 1-6)]

In dealing with Petitioner's contention that the trial judge erred in allowing certain previously suppressed statements of the Petitioner to be introduced during the penalty phase through the testimony of Sergeants Vail and Burnsed, the Florida Supreme Court agreed that error had occurred, but also found that the admission was not reversible error because substantially all of the information contained in those statements had already been presented to the jury in testimony relating to unsuppressed statements and in Petitioner's own testimony. The Court pointed out that the only new information was Petitioner's statement that he had thrown his gun into a canal. The Court held that, given all the other testimony and evidence, this one additional item was not critical or substantial and did not prejudice Petitioner in the sentencing phase. One consideration of the Court was the jury's verdict of guilt as to the murder, which implicitly rejected Petitioner's testimony that he had left the two girls alive at the convenience store. (A 4-5)

In his Initial Brief to the Florida Supreme Court, Petitioner argued that the trial judge's written findings of fact in support of the death penalty were so perfunctory that meaningful review was precluded. Petitioner requested remand for a more detailed statement of findings of fact, pointing out that the written findings failed to cite any facts in support of three out of the four aggravating circumstances that the trial judge found. (A 31-33) The Florida Supreme Court never specifically addressed this argument in its opinion. (A 1-6)

STATEMENT OF THE FACTS

The murder giving rise to the charge against Petitioner occurred in Daytona Beach, Florida. The substantially accurate and complete facts appear in the Florida Supreme Court opinion. (A 1-6) Deborah Miller and Carlene Kelley met the Petitioner at a filling station on their way to the Pier. After accepting Petitioner's offer of a ride, the trio drove around town in Petitioner's van and smoked a pipe of marijuana belonging to the

girls. They later went to the woods where Petitioner was growing several marijuana plants, stopping on the way to purchase a six-pack of beer. After talking for about an hour in the woods, the trio got back into the van and departed. The Petitioner drove only a few yards before he stopped the van, held a gun on the girls, and ordered them to undress. He forced Carlene Kelley to perform fellatio on him and may have also had sexual intercourse with her. Following this, Petitioner told the girls to get dressed and offered them a ride out of the woods without further harm. The girls agreed and the trio drove away. Petitioner drove approximately a quarter of a mile before Carlene asked to use the bathroom. Petitioner stopped the van and suggested that the girls could walk the short distance to the road, but told them that they should lie down behind the van while he drove away. As they lay on their stomachs, Carlene began to cry and Deborah noticed that the Petitioner had wrapped a towel around the barrel of his gun. Petitioner then shot Carlene and Deborah in the backs of their heads. He then retrieved a knife from the van and cut each girl's throat. Carlene's spinal cord was severed causing instantaneous death. Deborah managed to survive and made it to the highway where she received help from a passing motorist. Deborah Miller was the primary witness for the state and was able to identify the Petitioner at trial. (A 1-6)

Petitioner testified in his own behalf, admitting that he had consumed a substantial amount of beer and smoked marijuana. He also admitted to being with the girls that evening, but denied the sexual battery of Carlene Kelley and the subsequent attacks. He testified that he dropped the girls off at a nearby convenience store so that they could call a friend for a ride home. (A 1-6)

During the penalty phase, the state presented the testimony of two law enforcement officers, Sergeants Vail and Burnsed, concerning statements Petitioner had made during interrogation. Although these statements had been suppressed during the guilt phase, the trial judge admitted the evidence during the penalty phase over defense objection. At the conclusion of all

of the evidence, the jury voted nine-to-three to recommend imposition of the death penalty. The trial judge agreed, finding four aggravating circumstances [(1) during the commission of a felony, (2) to avoid arrest, (3) heinous, atrocious and cruel, and (4) cold, calculated and premeditated], and one mitigating circumstance, namely, that the Petitioner had no significant prior history of criminal activity. (A 1-6)

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS A RESULT OF THE PERFUNCTORY AND CONCLUSIVE NATURE OF THE TRIAL COURT'S WRITTEN FINDINGS OF FACT IN SUPPORT OF THE DEATH PENALTY THUS PRECLUDING MEANINGFUL REVIEW.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court approved Florida's death penalty statute, Section 921.141, Florida Statutes (1976). A key factor in upholding its constitutionality was the role that the Florida Supreme Court played in insuring that the death sentence was not imposed in an arbitrary or capricious manner. The statutory requirement that the trial court enter written findings of fact in support of the imposition of any death penalty is a major part of the Florida Supreme Court's review. The Florida Supreme Court has held that the primary purpose of requiring these written findings is to provide an opportunity for meaningful review so that it may be determined that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. Holmes v. State, 374 So.2d 944, 950 (Fla. 1979). The Florida Supreme Court has ordered a trial court to submit an amended more explicit, written findings of fact to enable proper review of the death sentence. Hall v. State, 381 So.2d 683 (Fla. 1979).

The written findings of fact entered by the trial court in support of the death sentence recite some facts which ostensibly could support a finding of heinous, atrocious and cruel. (A 31-33) Petitioner contends that the findings of fact as to the other three aggravating circumstances recite few if any facts which could arguably support their finding. (A 31-33) The

sketchy and conclusive nature of the written findings in this regard operate to deprive Petitioner his rights to due process of law since meaningful review by the Florida Supreme Court as well as by subsequent courts has been precluded. One finding of fact pertaining to the aggravating circumstance that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification [Section 921.141(i), Fla. Stat. (1981)], recites only that "the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (A 32) Such a perfunctory finding without any recited facts in support thereof certainly precludes any argument by Petitioner that the trial court impermissibly doubled certain facts to support two separate aggravating circumstances or any other meaningful review by an appellate tribunal. The constitutional deprivation suffered by Petitioner takes on greater magnitude when one considers that the written findings of fact entered by the trial court arguably recite facts which would support only one aggravating circumstance to be weighed against one valid mitigating circumstance. The entire weighing process is drastically altered by this revelation.

By affirming Petitioner's death sentence based in part upon the inadequate findings of fact of the trial court, the Florida Supreme Court has sanctioned cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United State Constitution. The affirmance flies in the face of the safeguards found in the Florida death-sentencing statute which this Court approved on its face. Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976). As such, the statute is unconstitutional as applied to the Petitioner. Furman v. Georgia, 408 U.S. 238 (1972).

The trial court's reliance upon and the Florida Supreme Court's affirmance based upon these perfunctory findings of fact could be analogized to the practice forbidden by Gardner v. Florida, 430 U.S. 349 (1977). Gardner involved the trial court's consideration of undisclosed, confidential portions of presentence reports in capital sentencing. In the instant case,

Petitioner is unsure exactly what facts the trial court relied upon in finding these aggravating circumstances, aside from the facts recited in support of a finding that the murder was heinous, atrocious and cruel. This conclusion naturally arises from the inability of the Petitioner to discover the basis of the findings of fact. As already explained, this necessarily results in a denial of due process and, correspondingly, cruel and unusual punishment.

II.

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE, LEFT UNREDRESSED THE TRIAL COURT'S DENIAL OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE TRIAL COURT RULED THAT CERTAIN PREVIOUSLY-SUPPRESSED STATEMENTS OF PETITIONER COULD BE INTRODUCED DURING THE PENALTY PHASE THROUGH THE TESTIMONY OF SERGEANTS VAIL AND BURNSED.

Section 921.141(1), Fla. Stat. (1981) provides in part:

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances.... Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. <u>However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida</u>. (emphasis added)

Prior to trial, Petitioner filed a motion to suppress statements which were illegally obtained. (A 18) This motion was granted in part and denied in part. (A 18-22) During the penalty phase, the state sought to introduce the testimony of Vail and Burnsed regarding Petitioner's statements. Defense counsel objected on the grounds that the statements were obtained in violation of Petitioner's constitutional rights. The prosecutor maintained that the testimony would serve as impeachment of Petitioner's trial testimony which, in turn, revealed the true character of Petitioner (that of a perjurer). The trial court allowed the testimony over objection by Petitioner's trial counsel. (A 23-30)

This issue was raised in Point IV of Petitioner's Initial Brief in his appeal to the Florida Supreme Court. (A 34-35) In dealing with this issue, the Florida Supreme Court agreed that the trial judge erred in admitting these statements after previously suppressing them. However, the Florida Supreme Court also found that the admission was not reversible error because "substantially all of the information contained in those statements had already been presented to the jury in testimony relating to unsuppressed statements of Appellant and in Appellant's own testimony." (A 5) In its opinion, the Court pointed out that the only new information was Petitioner's statement that he had thrown his gun into the canal. The Court went on to hold that this one additional item was not "critical or substantial and did not prejudice Appellant in the sentencing phase." (A 5) One consideration of the Florida Supreme Court in reaching this conclusion was the realization that the jury in the penalty phase was the same jury that found the Petitioner guilty of murder thereby implicitly rejecting his testimony proclaiming his innocence. (A 5)

Both the trial court and the Florida Supreme Court agreed that the objectionable evidence was obtained in violation of Petitioner's constitutional rights. The Florida Supreme Court also agreed that it was error for the trial court to allow the admission of this evidence during the penalty phase in contravention of the statute. However, the Florida Supreme Court apparently ruled that its admission was harmless error since it could not have possibly prejudiced the jury in reaching their nine-to-three vote recommending imposition of the death penalty. Petitioner contends that the introduction of this evidence violated his constitutional rights to due process of law and to a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Aside from the fact that the admission of this evidence was completely contrary to the Florida death penalty statute, it also constituted evidence of a non-enumerated statutory aggravating circumstance. Section 921.141, Florida Statutes (A 11-12) limits the aggravating circumstances to those specifically listed

in the statute. On several occasions, the Florida Supreme Court has held improper the consideration of numerous non-statutory factors. Miller v. State, 373 So.2d 882 (Fla. 1979); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Riley v. State, 366 So.2d 19 (Fla. 1978); Elledge v. State, 346 So.2d 998 (Fla. 1977); and Sawyer v. State, 313 So.2d 680 (Fla. 1975). It has been held error for the trial court to consider non-enumerated circumstances, as it is also objectionable for the state to present evidence of these matters to the judge and jury. This Court has also expressed concern over this type of consideration. Proffit v. Florida, 428 U.S. 242, 250 n.8 (1976).

The state claimed that the evidence revealed the character of Roy Harich, specifically that he had committed perjury on the witness stand. (A 23-30) This is clearly a non-enumerated aggravating circumstance, and as such, should not have been admitted. The testimony was totally irrelevant to any issue in the penalty phase.

By essentially holding that the admission was harmless error, the Florida Supreme Court overlooked the fact that both the judge and jury probably considered this non-enumerated aggravating circumstance in recommending and imposing the death sentence. The trial judge obviously considered the jury's nine-to-three vote recommending the imposition of the death sentence. The trial judge so stated in his written findings of fact. (A 24-26)

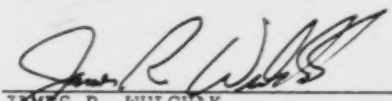
The constitutional deprivation looms extremely large when one considers the timing of the admission of the objectionable evidence. It came at the penalty phase and acted to reinforce the jury's suspicion that the Petitioner had lied in his testimony. In reaching the vote of recommendation, the jury obviously considered all of the evidence presented at the penalty phase as they were so instructed. This evidence included the statements by the Petitioner which were impermissibly obtained under the United States Constitution. As a result, Petitioner was denied due process of law and his right to a fair trial.

CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a Writ of Certiorari.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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APPENDIX

ALDERMAN, C.J., and ADKINS, OVERTON and EHRLICH, JJ., concur.

McDONALD, J., concurs in result only.

Roy Allen HARICH, Appellant,

v.

STATE of Florida, Appellee.

No. 62366.

Supreme Court of Florida.

Aug. 25, 1983.

Rehearing Denied Oct. 12, 1983.

Defendant was convicted in the Circuit Court, Volusia County, Uriel Blount, Jr., J., of first-degree murder, attempted first-degree murder, use of a firearm in the commission of a felony, and two counts of kidnapping, and he appealed. The Supreme Court held that: (1) evidence was sufficient to sustain defendant's conviction; (2) trial court committed no reversible error during guilt phase of trial; (3) allowing statements defendant had made during interrogation, which had been suppressed during guilt phase of trial, into evidence during penalty phase was error, but it did not mandate reversal because substantially all of the information contained in the statements had already been presented to the jury in defendant's own testimony; (4) new information contained in State's penalty phase testimony was not critical or substantial and did not prejudice defendant; and (5) in view of jury's vote, there was nothing in record to show that the jury was confused by inconsistent jury instruction.

Affirmed.

McDonald, J., concurred in part, dissented in part, and filed opinion.

1. Homicide ⇐232

Evidence including testimony of eyewitness was sufficient to establish premeditation and sustain conviction of first-degree murder.

2. Criminal Law ⇐683(1)

Trial court committed no error in admitting testimony of five rebuttal witnesses over defense objection.

3. Criminal Law ⇐1171.1(4)

Prosecutor's comments on defense trial tactics in final argument, while possibly bordering on improper, were not prejudicial.

4. Criminal Law ⇐986.6(3), 1177

Trial judge, in allowing statements defendant had made during police interrogation, which had been suppressed during guilt phase of trial, to be introduced during penalty phase, committed error, but admission was not reversible error because substantially all information contained in statements had already been presented to jury in unsuppressed statements of defendant and in defendant's own testimony. West's F.S.A. § 921.141(1).

5. Criminal Law ⇐1177

Defendant's statement that he had thrown his gun into canal, which was the only information in erroneously admitted statement that was not before same jury during guilt phase of homicide trial, did not prejudice defendant during sentencing phase, in view of graphic evidence presented during guilt phase.

6. Criminal Law ⇐1172.9

Although concluding sentence of jury instruction, that when seven or more jurors were in agreement as to what sentence should be recommended, form of recommendation should be signed, was inconsistent with directions contained in body of instruction, which informed jury that seven or more jurors were required to recommend imposition of death sentence, but six or more were required to recommend life imprisonment without possibility of parole, where there was neither objection nor suggested modification of last sentence of in-

struction, and jury returned death recommendation by nine to three vote, there was nothing in record to show that jury was confused by instruction and, in view of jury's vote, there was no prejudice.

7. Criminal Law ⇐713

Prosecutor's argument during penalty phase of trial was not improper.

8. Homicide ⇐354

Circumstances that defendant committed murder while committing crimes of sexual battery and kidnapping, for purpose of avoiding and preventing his lawful arrest, that killing was especially heinous, atrocious, and cruel, and was committed in cold, calculated manner without any pretense of moral or legal justification, were properly considered as aggravating factors in determining death sentence for murder.

9. Criminal Law ⇐986.4(2)

Where defendant had been convicted of first-degree murder, attempted first-degree murder, use of firearm in commission of felony, and kidnapping, trial judge did not err in refusing to order presentence investigation report before imposing death penalty following recommendation of jury.

10. Homicide ⇐354

Where defendant had been convicted of first-degree murder, attempted first-degree murder, use of firearm in commission of felony, and kidnapping, trial court had properly applied four aggravating factors and one mitigating factor, and trial judge had imposed death penalty after jury had recommended it, death penalty statute was not unconstitutionally applied.

11. Homicide ⇐354

Where defendant was convicted of first-degree murder of one teenage girl, attempted first-degree murder of second, use of firearm in commission of felony, and two counts of kidnapping, and four aggravating factors were found to apply to murder, but only mitigating factor was defendant's lack of prior criminal record, death penalty was appropriate.

James B. Gibson, Public Defender, and Christopher S. Quarles, Asst. Public Defender, Seventh Judicial Circuit, Daytona Beach, for appellant.

Jim Smith, Atty. Gen. and Shawn L. Briese, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

The appellant, Roy Allen Harich, was convicted of first-degree murder, attempted first-degree murder, use of a firearm in the commission of a felony, and two counts of kidnapping. The trial judge imposed the death sentence in accordance with the jury's advisory sentence recommendation for the first-degree murder conviction. The trial judge also sentenced appellant to a term of thirty years for attempted first-degree murder, fifteen years for the use of a firearm in the commission of a felony, and thirty years for each of the two kidnapping charges. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. We affirm the convictions, the imposition of the death sentence, and the sentences for the other offenses.

This cause concerns the brutal murder of one teenage girl, Carlene Kelley, and the attempted murder of a second teenage girl, Deborah Miller. Deborah, the surviving victim, testified at trial and stated that she and Carlene met the 22-year-old appellant at a filling station in Daytona Beach. The girls were in the process of walking to the pier when they stopped at the filling station, and they accepted appellant's offer of a ride to their destination. Rather than going to the beach, however, Deborah stated that the group drove around town in appellant's van and smoked a pipe of marijuana belonging to the girls. They later decided to go to the woods where appellant was growing several marijuana plants to obtain some more marijuana. On the way, they stopped at a convenience store and purchased a six-pack of beer. When they arrived at appellant's marijuana patch, they found that the marijuana leaves were damp so they placed the leaves on the van's engine cover to dry. They waited and talked for about an hour while trying to dry the

leaves. Deborah then asked if they could leave, and they got into the van and departed.

Deborah testified that appellant drove only a few yards down the deserted road before he stopped the van, held a gun on the girls, and ordered them to undress. He forced Carlene Kelley to perform fellatio on him. Deborah further testified that, though she did not actually see the act, she heard sounds which indicated that appellant also had sexual intercourse with Carlene. Appellant then told the girls to get dressed, which they did. As they started to walk away, appellant said that it was a long walk through the woods and that he would give them a ride, promising not to do anything more to them. The girls acquiesced and got back into the van.

Appellant drove them about a quarter of a mile before Carlene said she needed to use the bathroom. Appellant stopped the van and told Deborah and Carlene that they could walk the short distance to the road, but they should lie down behind the van while he drove away. They complied with this direction and lay down on their stomachs. Deborah stated that Carlene began to cry and beg appellant not to shoot her. Deborah looked up and saw that appellant had wrapped a towel around the barrel of his gun. Appellant told Carlene he would not shoot her if she was quiet, but immediately shot her in the back of the head. He also shot Deborah in the back of the head. Deborah further testified that Carlene was still alive after the shooting and that both she and Carlene were crying softly when she saw the appellant return carrying a knife. Deborah described how he stood behind her, lifted her head by her chin, and began cutting her neck with the knife; she tried to protect herself with her hands. Appellant left Deborah and cut Carlene's throat, severing her spinal cord and causing instantaneous death.

Deborah did not lose consciousness, and after concluding that Carlene was dead, she crawled and dragged herself out of the woods onto the side of the highway where she was found by a passing motorist. Medical testimony reflected that Deborah had a bullet wound in the back of her head and a severe laceration that extended across her neck, all the way through the neck in the posterior area, almost to the backbone, and all the way through the musculature in the anterior of the neck, down to the midline where the windpipe was severed. The emergency room doctor observed that, when Deborah arrived at the hospital, she was literally holding her head on with her hands. He testified that, in his opinion, it was almost unbelievable that Deborah could sustain this severe an injury and survive. At the hospital, Deborah was able to tell the police that her attacker was named Roy, and she provided a physical description of both the man and his van. She was the primary witness for the state and was able to identify appellant at trial.

Appellant testified in his own behalf, stating that he had consumed a substantial amount of beer and smoked marijuana that evening. He admitted picking up the girls at the filling station and driving them to a deserted area in the woods to pick marijuana. He testified that they waited in the woods for more than an hour while trying to dry the marijuana leaves, and that, when Deborah Miller asked if they could leave, they got into the van and departed. Appellant denied the sexual battery of Carlene Kelley, her murder, and the attempted murder of Deborah Miller. He stated that he drove the girls out of the woods and dropped them off at a nearby convenience store so they could call a friend for a ride home.

The jury found appellant guilty of the first-degree murder of Carlene Kelley; the attempted first-degree murder of Deborah Miller; the use of a firearm in the commission of a felony; and two counts of kidnapping.

In the penalty phase, appellant presented a clinical psychologist who testified that, though appellant was competent at the time of the offense, he was operating at that time under the influence of extreme mental or emotional disturbance because of his consumption of substantial amounts of

drugs and alcohol. Appellant called character witnesses who testified that appellant worked very effectively as a volunteer fireman and that he had been a model prisoner while confined in jail before his trial.

The state presented as evidence in the penalty phase the testimony of two law enforcement officers, Sergeants Vail and Burnsed, concerning statements appellant had made during interrogation; these statements had been suppressed during the guilt phase of the trial. The trial judge decided to admit these statements into evidence under the more liberal evidentiary standard of the penalty phase established in section 921.141(1), Florida Statutes (1981). At the conclusion of the penalty phase, the jury voted nine-to-three to recommend imposition of the death penalty.

The trial judge agreed with the jury and imposed the death penalty, finding as aggravating circumstances (1) that appellant murdered Carlene Kelley while he was committing or attempting to commit the crimes of sexual battery and kidnapping; (2) that he killed Carlene Kelley for the purpose of avoiding and preventing his lawful arrest; (3) that the killing of Carlene Kelley was especially heinous, atrocious, and cruel; and (4) that the capital felony was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. The trial court found one mitigating circumstance, specifically, that appellant had no significant prior history of criminal activity.

[1–3] Regarding the guilt phase of the trial, appellant asserts (1) that the evidence was insufficient as a matter of law to establish premeditation; (2) that the trial court committed reversible error in allowing testimony of five rebuttal witnesses over defense objection; and (3) that the prosecutor improperly commented on defense trial tactics in his final argument. We find the testimony of Deborah Miller clearly establishes premeditation, that there was no error in admitting the rebuttal testimony, and that the argument of the prosecutor, although possibly bordering on the improper, was not prejudicial, nor did it constitute reversible error. We affirm all of appellant's convictions.

With regard to the sentencing phase of the trial, appellant contends (1) that the trial judge improperly allowed the state to present evidence of appellant's statements which had previously been suppressed by the trial judge; (2) that the prosecutor engaged in improper argument during the penalty phase; (3) that the standard jury instruction used in the penalty phase is improperly worded to require seven votes to recommend the imposition of a life sentence; (4) that the trial judge erred in applying the four aggravating factors to this murder; (5) that it was reversible error for the trial judge to refuse to order a presentence investigation report; and (6) that our capital sentencing statute is unconstitutional.

[4] In regard to appellant's first contention, we find no reversible error. The trial judge, in allowing certain previously-suppressed statements of appellant to be introduced during the penalty phase through the testimony of Sergeants Vail and Burnsed, acted under the authority of section 921.141(1). This section provides in part that, during the penalty phase,

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances .... *Any such evidence which the court deems to have probative value may be received,* regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, *this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.*

(Emphasis added.) It is clear that whenever evidence is suppressed because it was secured in violation of the fourth or fifth amendment, this statute prohibits its introduction during the penalty phase unless

there is an appropriate exception as in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). We find that the court erred by admitting these statements into evidence after previously suppressing them, but we also find that the admission was not reversible error because substantially all of the information contained in those statements had already been presented to the jury in testimony relating to unsuppressed statements of appellant and in appellant's own testimony.

[5] The only new information contained in the state's penalty-phase testimony was appellant's statement that he had thrown his gun into the canal. Given all the other testimony and evidence in this cause, including the graphic testimony of the surviving victim, this one additional item concerning the gun was not critical or substantial and did not prejudice appellant in the sentencing phase. In considering the argument that this information was prejudicial to appellant, it should be remembered that the jury in the penalty phase was the same jury that found appellant guilty of murder and rejected appellant's testimony that he left the two girls alive at the convenience store.

The second point that merits discussion concerns the assertion by appellant that the instruction in the penalty phase deprived him of the life recommendation benefit in a tie vote situation. The trial judge in this instance instructed the jury in accordance with the Florida Standard Jury Instructions (Criminal) Penalty Proceedings-Capital Cases, F.S. 921.141 (rev. June, 1981):

> If a majority of the jury determine that the defendant should be sentenced to death, your advisory sentence will be:
>
> A majority of the jury by a vote of _____ advise and recommend to the court that it impose the death penalty upon the defendant.
>
> On the other hand, if by six or more votes the jury determines that the defendant should not be sentenced to death, your advisory sentence will be:
>
> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon the defendant without possibility of parole for twenty-five years.
>
> You will now retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the court, that form of recommendation should be signed by your foreman and returned to the court.

[6] We recognize that the concluding sentence of the last paragraph of the instruction is inconsistent with the directions contained in the body of the instruction. The concluding sentence should read:

> When seven or more of you are in agreement to recommend the imposition of the death sentence or when six or more of you are in agreement to recommend life imprisonment without the possibility of parole for twenty-five years, then the appropriate form of recommendation should be signed by your foreman and returned to the court.

The body of the instruction is correct, and in this case there was neither an objection nor a suggested modification of the last sentence of the instruction by appellant's counsel. The jury returned a death recommendation by a nine-to-three vote, and there is nothing in this record to show that the jury was confused by the instruction. In view of the jury's vote, we find no prejudice.

[7–10] We have fully considered appellant's contentions that the prosecutor's argument was improper, that the aggravating factors should not have been applied, that the trial judge should have ordered a presentence investigation report, and that our death penalty statute was unconstitutionally applied in this case. We find that these arguments have no merit and that they do not require discussion.

[11] For the reasons expressed, we affirm appellant's conviction for each of the offenses and expressly find that the death penalty is an appropriate punishment in this case.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, EHRLICH and SHAW, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part and dissenting in part.

This appellant was properly convicted. I disagree, however, on the imposition of the death penalty.

I believe an improper aggravating circumstance was found in that the evidence is insufficient to prove beyond a reasonable doubt that Harich killed for the purpose of avoiding and preventing lawful arrest. The trial judge correctly found that Harich had no significant history of prior criminal activity. The testimony of the psychologist who testified that when Harich committed his crimes he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law was substantially impaired, was not contradicted or substantially impeached. I feel that Harich should have been given the benefit of these mitigating circumstances. The appellant also presented nonstatutory mitigating evidence. The trial judge made no reference to this; hence, I cannot tell whether he found this evidence to have no probative value, felt it to have no weight, or simply ignored it.

The acts of this appellant were indeed egregious. Nevertheless, when considering the fact that he had no criminal record, had a temporary mental or emotional disturbance, temporarily lacked the capacity to conform to the requirements of law (even though legally sane) and was a person who was not only regularly employed but was a voluntary fire fighter, the death penalty is disproportionate to his circumstances. I would vacate his sentence of death with instructions to impose a life sentence.

James Roger HUFF, Appellant,

v.

STATE of Florida, Appellee.

No. 59989.

Supreme Court of Florida.

Sept. 1, 1983.

Defendant was convicted before the Circuit Court, Sumter County, John W. Booth, J., of murdering his parents, and he appealed. The Supreme Court held that: (1) circumstantial evidence was sufficient to take case to jury; (2) proffered character testimony was properly excluded where it was not directed at a pertinent trait of character as opposed to defendant's general character; and (3) it was reversible error to refuse mistrial when prosecutor implied that defendant had forged his deceased father's name to guarantee agreement where the State offered no evidence of forgery.

Reversed and remanded for new trial.

1. Criminal Law ⇐552(2)

Circumstantial evidence alone will convict in a capital case, absent a reasonable alternative theory.

2. Homicide ⇐268

Prosecution of son for killing his parents was for jury where son was seen in backseat of car with parents an hour and one-half before murders were reported, evidence was that killer had to be positioned in backseat, there was evidence that vehicle had been moved sometime subsequent to the murders and evidence that son was seen alone driving a car immediately after murders was inconsistent with son's story that he had been knocked unconscious by robbers.

3. Criminal Law ⇐387

Negative testimony is admissible on issue of defendant's character.

IN THE SUPREME COURT OF FLORIDA

ROY ALLEN HARICH, Appellant,	)	
vs.	)	CASE NO. 62,366
STATE OF FLORIDA, Appellee.	)	

MOTION FOR REHEARING

Appellant, by and through his undersigned counsel, and pursuant to Rule 9.330 Fla.R.App.P., respectfully requests that this Honorable Court grant this motion for rehearing of its opinion in the above-styled cause rendered on August 25, 1983. As grounds for this motion, Appellant states that this Honorable Court has overlooked and misapprehended certain points of law and fact which will be stated with particularity in the body of this motion.

Point IV of Appellant's Initial Brief contended that the trial judge improperly allowed the state to present evidence of Appellant's statements which had previously been suppressed by the trial judge. This Court found that the trial court did err in admitting these statements into evidence, but also found that the admission was not reversible error since substantially all of the information had already been presented to the jury through other testimony. In finding no reversible error, this Court overlooked the fact that the presentation of this evidence at the sentencing phase constituted evidence of a non-enumerated aggravating circumstance. This is based on the state's claim that the evidence revealed the character of the appellant, specifically that he had committed perjury on the witness stand. While it is true that most of the information did come to light during the guilty phase of the trial, Appellant contends that the timing of this evidence at the sentencing phase resulted in an improper consideration by the jury concerning their recommendation as to penalty.

Point VI of Appellant's Initial Brief pointed out the error contained in the Florida Standard Jury Instructions (Criminal) Penalty Proceedings - Capital Cases, F.S. 921.141 (rev. June, 1981). This Court recognized that the concluding sentence of the last paragraph of the instruction was inconsistent with the directions contained in the body of the instruction. In finding no prejudice to the appellant in the instant case, this Court relied heavily upon the jury's vote recommending the death sentence by a nine-to-three (9-3) vote. In placing such great reliance on the vote, this Court overlooked the fact that the last instruction that they heard was the incorrect instruction. As a result, it is very likely that the jury gave it primary consideration.

Furthermore, we know only that the final vote to recommend death was by a majority of nine-to-three (9-3). Since the jurors were operating under the incorrect instruction that seven (7) or more of them must be in agreement, it is entirely possible that the jurors decided that no tie vote was allowed and that some jurors surrendered honest convictions and beliefs so that they could return some recommendation. The jury may have been deadlocked six-to-six (6-6) before three (3) jurors eventually broke down and changed their votes to recommend death. This is a distinct possibility when one considers the process of jury deliberation. This Honorable Court has overlooked this fact.

The Court has also overlooked the fact that an improper aggravating circumstance was found in that the evidence is insufficient to prove beyond a reasonable doubt that the appellant killed for the purpose of avoiding and preventing lawful arrest. The Court has also overlooked the fact that Appellant's evidence at the sentencing phase that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired was not contradicted or substantially impeached by the state. This

Court has also overlooked the fact that the trial judge made no reference at all to the evidence of non-statutory mitigating evidence presented by the appellant.

The Court has also overlooked the total inadequacy of the trial court's findings of fact in support of the death penalty. The order cites few to no facts and Appellant was extremely hampered in his argument attacking these findings on appeal. Appellant submits that meaningful review was precluded as a result.

WHEREFORE, the appellant respectfully requests that this Honorable Court grant this motion for rehearing and order the appropriate relief as to each point.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida
32014-6183
Phone: (904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, at his office located at 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and a copy mailed to Mr. Roy Allen Harich, Inmate No. 083068, Florida State Prison, P.O. Box 747, Starke, Florida 32091, this 8th day of September, 1983.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

82-268
CQ

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, OCTOBER 12, 1983

ROY ALLEN HARICH,	**	
Appellant,	**	CASE NO. 62,366
vs.	**	Circuit Court Case No. 81-1894-BB (Volusia)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant, the motion for clarification filed by attorney for appellee and response thereto,

IT IS ORDERED by the Court that said motions be and the same are hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

C
cc: Hon. V. Y. Smith, Clerk
Hon. Uriel Blount, Jr., Judge

Christopher S. Quarles, Esquire
Richard W. Prospect, Esquire

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19564, 1939; CGL 1940 Supp. 8063(2644); s. 171, ch. 71-136.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19564, 1939; CGL 1940 Supp. 8063(2657); s. 172, ch. 71-136.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19564, 1939; CGL 1940 Supp. 8463(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 348, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.
Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 74-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 2806, ch. 19554, 1939; CGL 8436, 8437; CGL 1940 Supp. 8463(2750); s. 133, ch. 79-330.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA
CASE NO. 81-1894-BB

THE STATE OF FLORIDA

vs.

ROY ALLEN HARICH,

Defendant.

MOTION TO SUPPRESS ADMISSION ILLEGALLY OBTAINED

The defendant moves for the entry of an order suppressing admissions obtained from him by law enforcement officers, and for grounds says:

1) The admissions were obtained illegally.

2) The State intends to introduce testimony concerning those admissions at trial.

3) Use of such admissions at trial would violate the defendant's right to remain silent, guaranteed him by the United States Constitution, Amendments V and XIV.

WHEREFORE defendat prays for the entry of an order in accordance with the tenor of this motion.

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

By H B Pearl
Howard B. Pearl
Assistant Public Defender
Attorney for Defendant

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof was furnished to HORACE SMITH, Assistant State Attorney, by delivery this March 18, 1982.

H B Pearl
Attorney

FILED IN THE OFFICE OF THE
CLERK OF THE CIRCUIT COURT
VOLUSIA COUNTY, FLORIDA
MAR 18 1982
V. Y. SMITH, CLERK
By _____ Deputy Clerk

1212

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1894-B

THE STATE OF FLORIDA

VS.

ROY ALLEN HARICH,

Defendant.

V E R D I C T

As to Count I of the Indictment, We, the Jury, find the Defendant, ROY ALLEN HARICH,

__X__ Guilty as charged in the Indictment, to-wit: First Degree Murder;

_____ Guilty of Second Degree Murder;

_____ Guilty of Manslaughter;

_____ Not Guilty;

SO SAY WE ALL.

DATED at DeLand, Volusia County, Florida, this 8th day of April, A.D. 1982.

Filed in open Court
Seventh Judicial Circuit
Volusia County, Florida

APR 8 1982

W. R. Simmons, Clerk
By _____
Deputy Clerk

Richard R. Rigo
Foreman

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA
DIVISION H

STATE OF FLORIDA

CASE NUMBER 81-1894-B

—vs—

ROY ALLEN HARICH
Defendant

2347 0883 BOOK PAGE

APR 13 8 55 AM '82 0300 61 190030

JUDGMENT

The Defendant, ROY ALLEN HARICH, being personally before this Court represented by HOWARD B. PEARL, his attorney of record, and having

(Check Applicable Provision)
- ☒ Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty to the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
I	FIRST DEGREE MURDER	F.S.782.04(1)(a)	CAP	81-1894-B
III	ATTEMPTED FIRST DEGREE MURDER	F.S.782.04(1)(a) & F.S.777.04(4)(a)	1F	81-1894-B
IV	USE OF FIREARM WHILE COMMITTING OR ATTEMPTING TO COMMIT A FELONY	F.S.790.07(2)	2F	81-1894-B
V	KIDNAPPING	F.S.787.01(1)(a)	1F	81-1894-B
VI	KIDNAPPING	F.S.787.01(1)(a)	1F	81-1894-B

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

.....

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

☐ ~~The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S. 943.25(8).~~
(This provision is optional, not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of $ _____ pursuant to F.S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ ~~The Court hereby imposes additional court costs in the sum of $ _____~~

125

Imposition of Sentence Stayed and Withheld (Check if Applicable)

~~The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ (conditions of probation set forth in separate order.)~~

Sentence Deferred Until Later Date (Check if Applicable)

~~The Court hereby defers imposition of sentence until _____ (date)~~

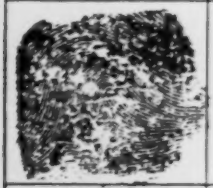
The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE and ORDERED in Open Court at DeLand, Volusia County, Florida, this 9th day of April, A.D. 1982.

2347 0884 BOOK PAGE

URIEL BLOUNT, JR., Circuit Judge

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little
				

Fingerprints taken by

Ralph G. Winters Bailiff

Name and Title

DONE AND ORDERED in Open Court at DeLand, Volusia County, Florida, this 9th day of April A.D. 19 82 I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, ROY ALLEN HARICH and that they were placed thereon by said Defendant in my presence in Open Court this date.

JUDGE

URIEL BLOUNT, JR., Circuit Judge

BOOK 2347 PAGE 885

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1894-B

COUNT I

THE STATE OF FLORIDA

VS.

ROY ALLEN HARICH,

Defendant.

SENTENCE

The Defendant, ROY ALLEN HARICH, being personally before this Court, accompanied by his attorney, HOWARD B. PEARL, and having been adjudicated GUILTY of the crime of MURDER IN THE FIRST DEGREE, under F.S. 782.04(1)(a), a Capital Felony, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE LAW that you, ROY ALLEN HARICH, be delivered by the Sheriff of Volusia County, Florida, with a copy of this sentence forthwith, to the proper officer of the Department of Corrections of the State of Florida and by him safely kept until by warrant of the Governor of the State of Florida, you, ROY ALLEN HARICH, be electrocuted until you are dead.

MAY GOD HAVE MERCY ON YOUR SOUL.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing Notice of Appeal with the Clerk of the Court within thirty (30) days following the date Sentence is imposed. The Defendant was also advised of his right to the assistance in taking said appeal at the expense of the State upon showing of indigency.

DONE and ORDERED in Open Court at DeLand, Volusia County, Florida, this 9th day of April, A.D. 1982.

Uriel Blount, Jr., Circuit Judge

returned; that there was an additional search thereafter or at least there was an entrance thereafter by the Sanford Crime Lab.

THE COURT: Do you intend to use it at trial?

MR. SMITH: Not if you suppress it, Your Honor.

THE COURT: I'll reserve ruling.

MR. PEARL: Judge, is that the best you can do?

THE COURT: On that.

As to the statements, the motion to suppress admissions illegally obtained, I think I must make certain findings of fact under the present posture of the case law.

The first finding of fact I'm going to make, Mr. Pearl, is a little bit different from what you've made a statement to me about.

The search warrant does not say what is to be seized, and I quote from the search warrant: "Vehicle (evidence of the crime of murder, to-wit: firearms, machete, hatchet, axe)."

I'm not going to discuss that further because I'm reserving ruling on those matters until we see how the case works. Let's proceed with the other matter.

I think it's incumbent under the evidence code 90.202(6) for the Court to take judicial knowledge of the records of any court of this state or of any court

of record of the United States, et cetera, for the Court to take judicial knowledge of the activities of this particular case before the Circuit Court of the Seventh Judicial Circuit in the County Court of Volusia County, Florida.

In review of the file, the Court takes the following things under judicial notice:

That the Defendant was arrested at 7:30 p.m. on June 28th, 1981; that on June 29th, 1981, at 9:00 a.m. a first appearance was held before the Honorable Harrison D. Griffin on the following charges: Use of a firearm during the commission of a felony, murder attempt; and I'm quoting, "murder in the first degree."

In accordance with the handwritten note of Judge Griffin, the Defendant was advised of his rights; was furnished a copy of the complaint. The Defendant requested a public defender. The Defendant was found not indigent.

Counsel was not appointed to represent him at that time, June 28th, 9:00 a.m.

An indictment was returned by the Grand Jury of Volusia County, Florida, at 6:30 p.m. on June the 30th, 1981. Capias was issued on June 30th, 1981, and served on the Defendant on July 1st, 1981.

An additional first appearance, based upon this

capias, was held on July 2nd, 1981, 9:00 a.m., before the Honorable Harrison B. Griffin.

The Public Defender was appointed at that first appearance on July the 2nd, 1981.

Taking notice of those facts, I make the following findings; and I would ask that you gentlemen take note of these so that a proper order can be prepared.

That on the statements of June 28th, 1981, at the time and prior to the arrest of the Defendant, that these statements by the accused were voluntary, spontaneous utterances and were not made by inducement, threats or divisiveness or overzealous activity or conduct on the part of law enforcement officers.

The statements made on July 30th, 1981 --

MR. PEARL: July what, Your Honor?

THE COURT: June. Excuse me. June 30th, 1981, were freely and voluntarily made after the Defendant had been advised of his rights by law enforcement agencies and also by County Judge Griffin at first appearance; that the statements made on July 10, 1981 and July 13, 1981, after the appointment of counsel and without the consent of counsel, these statements must be suppressed.

The statements made on January 11, 1982, were made at the indicia and encouragement of the Public Defender's

office, defense counsel, and therefore, admissible.

MR. PEARL: I don't believe any were made then.

THE COURT: Well, I'm making these findings of fact. I can't really tell from your motion which ones you're referring to. It just says "any illegally obtained." So, I want to address myself to all these matters now.

Any statement made to Sergeant Wall is admissible, and the Court makes a further finding of fact that these were freely and voluntarily given.

As to tangible evidence, I will reserve ruling on that until I hear additional testimony at the time of trial or any other time that counsel would desire to be heard.

MR. PEARL: May it please the Court, I believe there was testimony of statements, was there not, of statements made by Mr. Harich to Investigator Vail subsequent to his arrest?

THE COURT: On June 30th?

MR. PEARL: No. On June 28th.

Was he not arrested at the house?

THE COURT: All I could tell, which I've taken judicial knowledge of, he was arrested at 7:30 p.m. on June 28th, 1981.

MR. PEARL: Yes, but I think the issue arises here which has not been addressed by the findings of fact

as to statements made by Mr. Barich after he'd been given his rights and had said that he wanted to call his attorney and wanted his attorney present.

THE COURT: That's what I've made a finding of fact on: That they were freely and voluntarily made, as they were not made by inducement, threat, divisiveness or overzealous activity or conduct by law enforcement. That's both as to prior and at the time of the arrest.

I agree with counsel you're on thin ice, but I'm making this specific finding of fact as to that ground.

MR. PEARL: And that is --

THE COURT: On June 28th and June 30th.

MR. PEARL: And that, Your Honor -- Excuse me for asking for further clarification.

THE COURT: That's all right. Sure.

MR. PEARL: But that is even though questions were directed to the Defendant and answered by him?

THE COURT: That's right. That's the reason I put the conditions in as to why I said that in my finding of fact.

Anything further?

MR. SMITH: No.

Do you want one of us to prepare an order?

THE COURT: If any of you all have any more time

THE COURT: Do we have any other matter to come up at this time before we bring in the jury?

MR. PEARL: Yes, Your Honor.

May I proceed?

THE COURT: Yes, sir.

MR. PEARL: I am advised, by Mr. Smith, that it is proposed, in Phase 2, that the State will put on the testimony of Investigator Robert Vail and Investigator Burnsed with respect to statements made to them during the investigation by the Defendant, Roy Harich. I object to such testimony being put on and move, in limine, that the State be directed not to do so.

As authority therefor, and as grounds therefor, I would show that heretofore the alleged statements made by Mr. Harich to Investigators Vail and Burnsed have been surpressed upon motion by the Defendant. And the Court has found and ordered that those statements could not be produced during the main part of the trial upon the ground that they were taken in violation of the Defendant's constitutional rights.

Section 921.141, Florida Statutes, subone,

states, in pertinent part, as follows:

"Any such evidence which the Court deemed to have probative value may be received during the penalty phase, regardless of its admissibility under the exclusionary rules of evidence, provided the Defendant is accorded the fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to offer the introduction of any evidence secured in violation of the Constitution of the United States, or the Constitution of the State of Florida."

On that basis, Your Honor, I feel that Investigators Vail and Burnsed should not be permitted to testify with respect to statements made to them by Mr. Harich during the investigation at a time when, as the Court has held, that they were taken in violation of his rights under the Miranda Decision and were, I contend, coerced, invalid and unlawful.

MR. SMITH: May it please the Court.

THE COURT: You may proceed.

MR. SMITH: Your Honor, this issue originally came before the Court on March 24th, 1982, at a hearing held for purposes pursuant to

motions to suppress filed by the Defendant. After the hearing --

And the State does intend to put on the testimony of Deputy Vail, which the Defendant made to him, statements made to him on June 28th of 1981. And Investigator Burnsed, the statements made to him on June 30th, 1981.

At the hearing of March 24th, 1982, the Court ruled, at that time, that those statements were voluntarily made. In other words, they were not coerced.

At the trial, when the State attempted to place that testimony, which the Court already ruled was voluntary, into evidence, at that time, of course, the Defendant testified. He did not testify at the March 24th hearing. At that time he testified that he had requested an attorney prior to making the statements to Investigator Vail and Investigator Burnsed. So we had a statement where the statements were given voluntarily, but then we had -- on March 24th, at least, the Court found they were not coerced.

And then at the time of trial the Defendant testified he was not given a right to an

attorney in violation of his Miranda. And the Court then ruled because of that particular violation, because of his right to seek counsel, that at that time the statements could not be used. But still, in my opinion, I saw nothing that would change the voluntariness of it, except for that one fact, that he was, requested the right to an attorney. And the Court so ruled.

We are now in a different stage. We are not in the stage of innocence or guilt. We are in the stage of sentence recommendation. The Statute 921.141 allows evidence to be presented which the Court deems relevant to the character of the Defendant.

The jury has already found that the Defendant is guilty. And the statements, of course, go to the fact of the fact the Defendant admitted that he was aware where these particular girls were when he last saw them and of the weapon involved. And the jury had not heard that.

At this point we are putting this in, or attempting to place this evidence before the Court to show the character of the Defendant.

To show that while he took the stand, and he has denied making these statements, that he perjured himself. And that he has made inconsistent statements, which goes to his character.

Also, we further point to the Court, in the case of Hughey versus the State of Florida, which I cited earlier, Case No. 81-1106, Fifth District Court of Appeals. The case was cited on March 31st, 1982, where this exact question came up at the trial stage. And the Court stated at that particular time that statements made in violation of Miranda, when he requested counsel, and statements made by him could not be used against him at the main part of the trial. However, they could be used for impeachment purposes, alone, and for that purpose. And that was a case involving guilt or innocence at that particular stage.

Here we are not in that stage, but only going to character. And under the Hughey case, which incorporates Nolan versus State, which is a Supreme Court case in the State of Florida, and the Harris versus New York, which is a United States Supreme Court case, they are all consistent. That we are attempting to place

this into evidence, that it goes to his character.

We disagree with counsel's reason for wanting to have this excluded at this particular time because the only grounds would be that it was in violation of his constitutional rights, that it is coerced, or otherwise not voluntary, which the Court ruled upon originally.

MR. PEARL: Your Honor, I respectfully disagree with counsel. And stand upon the grounds heretofore stated, that such testimony would be brought in violation of the Defendant's constitutional rights, both under the federal and state constitution.

It is significant that in the Hughey case cited by counsel, and following Nolan and Harris, the Fifth District Court of Appeals said, as a part of its last paragraph:

"In the case before us there is no evidence to indicate the statements were coerced or otherwise involuntary."

That follows Nolan, which held that impeachment could be used unless the statements were involuntary or coerced.

Now, in the testimony elicited from Investigator Vail, on the 24th of March, we found that after the Defendant had been advised of his Miranda rights, and after he had indicated that he wanted the assistance and advice of an attorney before questioning, Investigator Vail questioned the Defendant further and persisted in questioning him further, eliciting responses by asking those questions.

Now, if the statements made by the Defendant, after warning and even after requesting counsel, had been spontaneous utterances and not elicited by questions propounded to him by the investigator, I would say that they were voluntary and uncoerced.

But having been subjected to persistent and aggressive questioning, after indicating his need and desire for counsel, I say that the answers elicited thereto were, in fact, coerced and involuntary.

And I think that was further brought out on the Defendant's testimony during trial when the proffer was made by the State for the purposes of impeachment. And, therefore, I think that the statements made to Investigators Vail

and Burnsed do not satisfy the requirements of Nolan, of Hughey or of Harris.

THE COURT: I am not going to change any rulings that I have made prior to this. However, for the purposes of this hearing, I believe we have a different set of facts as they apply to the law. And the objection will be overruled. I will allow the testimony to be made for the purposes of this hearing only.

Mr. Bailiff, would you bring in the jury?

[Jury seated]

THE COURT: Ladies and gentlemen of the jury, you have found the Defendant, Roy Allen Harich, guilty of the crime of first-degree murder.

As I advised you, when the charge of the law was given you at the conclusion of the case, the punishment of this crime is either death or life imprisonment without possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely upon the Judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA
CASE NO. 81-1894-BB

THE STATE OF FLORIDA

VS.

ROY ALLEN HARICH,

Defendant.

Filed in open Court
Seventh Judicial Circuit
Volusia County, Florida

APR 9 1982

V. Y. SMITH, CLERK
By _____
Deputy Clerk

COURT'S FINDINGS OF FACTS
IN SUPPORT OF THE DEATH PENALTY

The Defendant, ROY ALLEN HARICH, was before the Court on an Indictment charging him with the following offenses, to-wit:

Count I, First Degree Murder
Count II, Aggravated Battery
Count III, Attempted First Degree Murder
Count IV, Use of a Firearm While Committing or Attempting to Commit a Felony
Count V, Kidnapping
Count VI, Kidnapping

That prior to the beginning of the trial Count II, Aggravated Battery, was removed from consideration by the Jury and the Jury was sworn to try remainder counts. Verdicts of Guilty, as to each charge was returned by the Jury on April 8, 1982. On April 9, 1982, the trial Jury was recovened to conduct a separate sentencing proceeding. Testimony was received and after argument of counsel, the Jury returned a recommendation that the Death Penalty be imposed. The recommendation by the Jury was by a nine to three vote. The Court after carefully studying, considering, reviewing and weighing all of the evidence in the case at the trial of this matter and of the separate sentencing proceeding makes the following findings of fact:

AS TO AGGRAVATING CIRCUMSTANCES:

1. That the Defendant, ROY ALLEN HARICH, did kill

and murder CARLENE GAYLE KELLEY by shooting her with a firearm and cutting her throat with a sharp instrument. The Defendant, ROY ALLEN HARICH, committed said crime while he was in the commission of or attempting to commit crime of Sexual Battery and Kidnapping.

2. That the Defendant, ROY ALLEN HARICH, did kill and murder CARLENE GAYLE KELLEY for the purpose of avoiding and preventing a lawful arrest after compelling CARLENE GAYLE KELLEY to perform fellatio on him and after attempting to kill and murder DEBORAH MILLER subsequent to the kidnapping of each of these victims.

3. That the capital felony of killing and murdering CARLENE GAYLE KELLEY was especially wicked, evil, atrocious and cruel in that after compelling the victim to perform fellatio on him, he ordered her to lay on the ground and placed a gun to her head and fired a shot through her skull, the bullet exiting through the cheek. While the said victim lay sobbing in the sand, the Defendant, ROY ALLEN HARICH, with a sharp instrument almost decapitated the victim and in so doing did sever her backbone and spinal column.

4. That the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

AS TO MITIGATING CIRCUMSTANCES:

The Court charged the Jury at the request of the Defendant and consented to by the State that the mitigating circumstances in this cause were as follows:

1. The Defendant, ROY ALLEN HARICH, has no significant history of prior criminal activity.

2. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

3. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law was substantially impaired.

4. The age of the Defendant at the time of the crime.

5. Any other aspect of the Defendant's character or record and any other circumstance of the offense.

These mitigating circumstances were rejected by the Jury by a vote of nine to three and the Court does find, however, that the Defendant, ROY ALLEN HARICH, has no significant history of prior criminal activity.

The Court further finds that the one mitigating circumstance is out-weighed by aggravating circumstances. This killing was tortuous to the victim in light of the totality of the circumstances. It is the reasoned judgment and opinion of the Court that the advisory sentence of the jury should be followed and the Court finds the Death Penalty would be appropriate in the case of ROY ALLEN HARICH and it is so ordered.

These findings and the orders of this Court are based solely upon the testimony of the witnesses in this matter before the Jury, the argument of counsel for the state and defense, and are not based on any pre-sentence investigation, juvenile case files, psychiatric reports or otherwise and the Court did not consider any information which the Defendant had no opportunity to deny or explain.

DATED and FILED in this cause this 9th day of April, A.D. 1982.

Uriel Blount, Jr., Circuit Judge

infected with such partiality. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

POINT VII

IN VIOLATION OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF FLORIDA, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE SINCE IT IS BASED ON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES AND THE FAILURE TO FIND THE EXISTENCE OF VALID MITIGATING CIRCUMSTANCES.

Following presentation of evidence of the penalty phase, the jury returned an advisory recommendation that the death penalty be imposed. Judge Blount sentenced Roy Harich to die for the first degree murder conviction. (R920-926) In imposing the death penalty, Judge Blount found four aggravating circumstances: (1) that the murder was committed during the commission of or attempt to commit the crimes of sexual battery and kidnapping; (2) that the murder was committed for the purpose of avoiding and preventing a lawful arrest; (3) that the murder was especially wicked, evil, atrocious and cruel; and (4) that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R1254-155) Judge Blount noted that the jury was instructed on five mitigating circumstances but concluded, "These mitigating circumstances were rejected by the Jury by a vote of 9 to 3...". Judge Blount did find the mitigating circumstance of no significant history of prior criminal activity. (R1255-1256) Judge

Blount's final conclusion was "...that the one mitigating circumstance is out-weighed by aggravating circumstances." (R1256)

Initially Appellant objects to the form of the trial court's findings of fact in support of the death penalty. The findings fail to cite any facts in support of three out of the four of the aggravating circumstances that the judge relied upon. (R1254-1255) The facts cited in support of the finding that the murder was "especially wicked, evil, atrocious and cruel" cites only very limited facts. (R1255) As a result, Appellant feels extremely handicapped in his argument on the instant issue.

Appellant submits that the court's findings are so inadequate that meaningful review by this Court is precluded. Holmes v. State, 374 So.2d 944 (1979). Appellant contends that he is prejudiced in his argument on appeal as a result of the perfunctory nature of the findings. Appellant requests this Court for a remand for a more detailed statement of findings of fact. Hall v. State, 381 So.2d 683 (1978). Given the limited nature of the findings, Appellant will attempt to argue this point, but urges this Court to grant the requested relief.

The sentence of death imposed upon Roy Harich must be vacated. The court, over defense objection, improperly instructed the jury on inappropriate aggravating circumstances, considered non-statutory aggravating evidence, found an unenumerated aggravating circumstance, failed to consider and find highly relevant and appropriate mitigating factors, and limited his consideration to the statutory mitigating circumstances. Additionally, the trial court accorded too much weight to the

IN THE SUPREME COURT OF THE UNITED STATES

ROY ALLEN HARICH, Petitioner,	)	
vs.	)	CASE NO. 83-5909
STATE OF FLORIDA, Respondent.	)	

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, ROY ALLEN HARICH, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted in the Circuit Court for Volusia County, Florida, for first degree murder, attempted first degree murder, two counts of kidnapping and use of a firearm in the commission of a felony following a jury trial.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state trial and appeal proceedings.

STATE OF FLORIDA
COUNTY OF Bradford

Roy Allen Harich
ROY ALLEN HARICH

Sworn to and subscribed before me

this 8 day of Dec., 1983.

Bennie Hannigan
Notary Public, State of Florida

My commission expires: NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 21, 19..

No. 83-5909

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

ROY ALLEN HARICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT

STATE OF FLORIDA)
) SS.:
COUNTY OF VOLUSIA)

JAMES R. WULCHAK, being duly sworn, states:

1. I am counsel to ROY ALLEN HARICH, whose petition for writ of certiorari is being filed herewith, and I make this affidavit in support of this client's motion for leave to proceed in forma pauperis.

2. This client is presently in the custody of the State of Florida under sentence of death and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to this client and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by this client is attached hereto.

3. An attorney was appointed to represent ROY ALLEN HARICH, at his trial and on his appeal.

4. I am informed and believe that because of his poverty, the client is unable to pay the costs of this cause or to give security for same.

5. I believe that ROY ALLEN HARICH is entitled to redress in this cause for the reason that his sentence of death was imposed in violation of his legal rights under the Constitution of the United States.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida
32014-6183
Phone: (904) 252-3367

Sworn to and subscribed before me
this 9th day of December, 1983.

Lucille B. Snydam
Notary Public, State of Florida

My commission expires:

Notary Public, State of Florida
My Commission Expires July 15, 1985

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROY ALLEN HARICH,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

83-5909
CASE NO.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

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2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state trial and appeal proceedings.

STATE OF FLORIDA
COUNTY OF _____

_____
ROY ALLEN HARICH

Sworn to and subscribed before me

this ____ day of _____, 1983.

_____
Notary Public, State of Florida

My commission expires:

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-5909

ROY ALLEN HARICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Fl
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COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-5909

ROY ALLEN HARICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I. Whether the Petitioner is entitled to review of an alleged procedural error by a state court where the error was not objected to at time of trial and where the Florida Supreme Court reviewed and rejected said claim and where no demonstrable prejudice to the Petitioner has been shown.

II. Whether the Petitioner is entitled to review of a perceived error in the admission of certain testimony, previously suppressed, which merely duplicated testimony already received by the jury from other sources.

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITY

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 437 So.2d 1082 (Fla. 1983).

JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 United States Code, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's cited references, and would additionally cite:

1. Section 924.33 Florida Statutes (1970):

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

STATEMENT OF THE CASE

Roy Allen Harich was indicted by grand jury for the crimes of first degree murder, attempted first degree murder, use of a firearm in the commission of a felony and two counts of kidnapping. The details of this incredibly vicious crime are set forth in the opinion of the Supreme Court of Florida, and do not require restatement.

Harich was convicted on all counts, and sentenced to death on the first degree murder conviction.

The trial judge submitted a written order explaining his decision (and his findings of aggravating and mitigating circumstances). No objection was ever raised regarding this order.

On appeal, Harich fully briefed and argued every finding of the trial court. His brief states that he found the court's written findings inadequate, and he requested (de novo) a remand for the purpose of having the trial judge

submit a more detailed order. He did not, however, suggest that reversal of his sentence was required, nor were any federal or constitutional claims raised regarding this alleged ministerial error by the trial judge. The opinion of the court does not even discuss this issue.

Harich also argued that the trial judge erred in admitting testimony at the sentencing hearing that had been suppressed during the guilt phase of Harich's trial. This testimony involved certain post arrest claims by Mr. Harich that he left his victims (alive) at a convenience store, and a later comment that he threw his gun in a ditch.

Since the jury had already (during the guilt phase) heard the story about the convenience store and obviously rejected it, and since "how" Harich's gun vanished was not a crucial issue at the sentencing phase, Florida's Supreme Court deemed any error in admitting this testimony harmless.

SUMMARY OF ARGUMENT

It is suggested that certiorari should be denied for several reasons; including Petitioner's failure to raise any federal question (as to ground one) in state court and his failure to allege or show a sufficient basis to prompt this Honorable Court's review of harmless error.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW AN ALLEGED FEDERAL CLAIM THAT WAS NEVER PRESENTED TO THE STATE COURTS AND, EVEN IF EXTANT, WOULD NOT IN ANY EVENT WARRANT REVERSAL.

Although Harich made a passing reference to an alleged "lack of detail" in the trial court's sentencing order while appealing his case to the Supreme Court of Florida, Harich never alleged, argued or demonstrated any Fifth or Fourteenth Amendment claims. In fact, Harich never even suggested to any Florida court that his sentence should be reversed.

Harich's "claim", if any, was so innocuous that it was not even deemed worthy of comment by the Florida Supreme Court.

It is well settled that this Honorable Court does not exercise jurisdiction over questions that were not addressed to the courts of the respondent state. Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969); Monks v. New Jersey, 398 U.S. 71, 90 S.Ct. 1563 (1970); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161 (1969).

Harich never alleged any Fifth or Fourteenth Amendment claim, and, in fact, never requested any relief other than a remand for the purpose of supplementing the order of the court. Harich then proceeded to argue every "aggravating" and "mitigating" circumstance in detail, effectively disproving any alleged "inability" to argue.

It was obvious that the claimed "prejudice" in the brief was a chronic reaction to a perceived technical, ministerial, error. It was merely "something to argue" even though, in truth, no prejudice existed. This claim was unworthy of notice by the Supreme Court of Florida, which did not rule upon it.

Traditionally, this Honorable Court has refused to rule on issues that were not properly raised, and thus not ruled upon, by the state courts. Walters v. St. Louis, 347 U.S. 231, 74 S.Ct. 505 (1954); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962).

Of course, if the sentencing order had been deficient, the deficiency would merely be corrected by having the trial judge re-draft his findings. See Holmes v. State, 374 So.2d 944 (Fla. 1977), certiorari denied 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). Such an error would not lead to reversal.

Absent the presentation of any federal claim to any Florida court, certiorari should not be granted.

II. THE PETITIONER HAS FAILED TO ESTABLISH ANY BASIS FOR RECONSIDERATION OF THE FLORIDA SUPREME COURT'S FINDING OF HARMLESS ERROR.

Mr. Harich abducted two young ladies and brutally butchered them with a gun and a knife. The slaughtering of the deceased, supported by graphic evidence and eyewitness testimony clearly overwhelmed any comment that, sometime later, Harich threw away his gun. No one can argue in good faith that the jury, but for the "throw away" comment, would have forgiven Harich for shooting these girls and sawing their throats open with a knife while they were still alive.

The Florida Supreme Court, viewing the totality of the circumstances, made a totally realistic finding of harmless error. "Harmless error" is an available result under Florida law (Section 924.33, Florida Statutes (1970)), and is recognized by this Honorable Court.. Barclay v. Florida, ___U.S. ___ (1983), 103 S.Ct. 3418.

In United States v. Hasting, ___U.S. ___ (1983), 103 S.Ct. 1974, 1980, this Honorable Court stated:

> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, e.g., Brown (supra) 411 U.S., at 230-232, 93 S.Ct., at 1569-1570;

This Honorable Court is not required to review records and reevaluate findings of harmless error, United States v. Hasting (id), and has made clear its intent to engage in such review sparingly.

Mr. Harich has failed to demonstrate any reason to undertake any review of the Florida court's finding of harmless error. The Florida Supreme Court's finding had an adequate foundation in the substantive law of the state.

See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

This Court has refused to conjecture that the state court acted differently in applying state law than it would, and then set up its own ruling. See Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948). There exists no reason to start now.

The Florida "harmless error" rule states (as does the federal rule) that mere error will not compel reversal absent a showing of prejudice, and there is no presumption of prejudice. Palmes v. State, 397 So.2d 648 (Fla. 1981) cert. den. 454 U.S. 882 (1981); Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. den. 444 U.S. 885 (1975).

Again, most of the "objectionable" information had already been exposed to the jury by other witnesses, and thus, when added to the overwhelming evidence against Harich, was of little or no impact. See Milton v. Wainwright, 407 U.S. 371 (1972). The only "new" information was the comment that Harich disposed of his gun (a fact probably assumed by the jury when no gun surfaced at trial).

Harich's crime was incredibly brutal, and met many of the criteria for imposition of the death sentence. Even if the fact he disposed of the gun did relate to, say, a desire to evade prosecution, the totality of the circumstances clearly renders any inference to disposal harmless.

Harich argues that the comment "reinforced the suspicion Harich lied." So? If Harich was ever deemed credible he would have been acquitted. Besides, this claim is totally speculative, and disputed.

The State suggests that the sentencing phase was dominated by the spectre of those helpless, butchered and abused girls, not the image of Harich tossing away his gun sometime later.

Thus, relying upon this Honorable Court's announced standards, and the obviously correct findings of harmless error,

and the absence of a realistic claim of "prejudice", there is simply no reason for this Honorable Court to undertake a review of the finding of harmless error.

CONCLUSION

Mr. Harich raises two claims as justifying the granting of certiorari.

The first ground is one never presented to any state court, and is improper.

The second "ground" is an insufficient request for this Court to undertake its sparingly used power to review findings of harmless error, a request that fails to demonstrate prejudice to his case.

There is no legal basis for the granting of certiorari.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Fl
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT.

IN THE

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ROY ALLEN HARICH,
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Respondent.

CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To the Supreme Court of Florida, Brief For Respondent In Opposition, by depositing said in the United Post Office, Daytona Beach, Florida, with first class postage prepaid, addressed as follows:

JAMES R. WULCHAK, ESQUIRE,
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER,
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183

on this 9th day of January, 1984.

Mark C. Menser
Of Counsel for Respondent